



BRB Nos. 15-0360
and 15-0496

SHAHWALI SHAH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WORLDWIDE LANGUAGE RESOURCES, INCORPORATED)	DATE ISSUED: <u>May 23, 2016</u>
)	
and)	
)	
ALLIED WORLD NATIONAL ASSURANCE COMPANY/BROADSPIRE)	
)	
Employer/Carrier- Respondents)	DECISION and ORDER

Appeals of the Attorney Fee Order and Order Denying Reconsideration of Christopher Larsen, Administrative Law Judge, United States Department of Labor, and the Compensation Order Awarding Attorney Fees of Marco Adame, II, District Director, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Maryann C. Shirvell and Jamie B. Horowitz (Laughlin, Falbo, Levy & Moresi, LLP), San Diego, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order and Order Denying Reconsideration (2014-LDA-00614, 2014-LDA-00816) of Administrative Law Judge Christopher Larsen and the Compensation Order Awarding Attorney Fees (Case Nos. 02-301197, 02-203273) of District Director Marco Adame, II, rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33

U.S.C. §901 *et seq.* (the Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* The amount of an attorney's fee award is discretionary and may be set aside only if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained injuries as a result of a helicopter crash which occurred on or about June 20, 2010, while he was working for employer as an interpreter in Afghanistan. In 2012, the parties stipulated to an award of benefits for these injuries. Claimant, beginning in February 2012, returned to Afghanistan for a second tour of duty with employer. Shortly after the end of that tour of duty, claimant alleged he sustained cumulative traumatic injuries to his left ankle, left leg, right knee, back and neck, as well as post-traumatic stress disorder, due to his continued work in Afghanistan for employer. In a decision dated March 3, 2015, the administrative law judge awarded claimant continuing temporary total disability benefits from October 1, 2013, based on an average weekly wage of \$3,490.23, as well as medical benefits for claimant's work-related lower back and right knee injuries.

Claimant's counsel sought, and was awarded, an attorney's fee for work performed before both the district director and the administrative law judge. Counsel, dissatisfied with the hourly rates awarded by the administrative law judge in his Attorney Fee Order dated May 11, 2015, and filed by the district director on May 14, 2015, submitted a motion for reconsideration, dated June 1, 2015, to the administrative law judge. Claimant's motion for reconsideration was received by the Office of Administrative Law Judges (OALJ) on June 4, 2015. The administrative law judge summarily denied counsel's motion for reconsideration; he did not address employer's contention that the motion was untimely filed.

On appeal, claimant's counsel challenges the hourly rates awarded for attorney work by the administrative law judge, BRB No. 15-0360, and the district director, BRB No. 15-0492. Employer responds, urging the Board to dismiss counsel's appeal of the administrative law judge's Attorney Fee Order as untimely filed. Specifically, employer contends that counsel's motion for reconsideration was untimely because it was not filed within ten days of the filing of the administrative law judge's Attorney Fee Order by the district director on May 14, 2015. Employer thus maintains that the untimely motion for reconsideration did not suspend the time for filing a notice of appeal of that decision, pursuant to 20 C.F.R. §802.206. Employer, therefore, contends that counsel's June 22, 2015 Notice of Appeal was filed beyond the 30-day time limit imposed by 33 U.S.C. §921(a) and 20 C.F.R. §802.205(a). In his reply brief, counsel states, "[t]he Petition for Review was timely filed noting the transpiring of other events which prolonged the period to petition until May 29, 2015, plus five days for mailing as noted in [employer's

response] brief.” Reply Brief at 3.¹ Thus, counsel maintains that he “filed the appeal within the 30 days allowed as the Order Denying Reconsideration was filed on June 19, 2015, and the appeal was filed on June 22, 2015.” *Id.*

An appeal to the Board must be filed within 30 days of the date the administrative law judge’s order was filed by the district director. 33 U.S.C. §921(a); 20 C.F.R. §§702.350, 802.205(a). Section 802.206(a) of the Board’s regulations states that “a timely motion for reconsideration of a decision or order . . . shall suspend the running of the time for filing a notice of appeal” (emphasis added). Section 802.206(b)(1) provides that a motion for reconsideration is timely, in a case arising under the Act, when it is filed no later than ten days from the date the order was filed in the district director’s office. Section 802.206(d), (e) provides the full time for filing an appeal commencing on the date the order granting or denying reconsideration is filed. 20 C.F.R. §802.206(a), (b)(1), (d), (e); see *Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 7 BRBS 923 (1978), *rev’d on other grounds*, 593 F.2d 234, 10 BRBS 614 (3^d Cir. 1979); *General Dynamics Corp. v. Hines*, 1 BRBS 3 (1974).

In its decision in *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff’d sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001), the Board addressed the calculation of the ten-day reconsideration period in 20 C.F.R. §802.206(a) for purposes of determining the timeliness of the claimant’s notice of appeal. The Board stated that as neither the Act nor the regulations at 20 C.F.R. Part 702 or 29 C.F.R. Part 18 address motions for reconsideration to an administrative law judge,² it followed that the Federal Rules of Civil Procedure (FRCP) governed the filing of these motions, consistent with 29 C.F.R. §18.1.³ The Board thus held that FRCP 6(a)⁴ applied to the filing of motions for

¹Counsel neither identifies nor explains the “other events” which purportedly prolonged the filing period for his motion for reconsideration.

²We recognize that the new OALJ Rules include Section 18.93 which explicitly states that “[a] motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party.” 29 C.F.R. §18.93 (2015). This regulation, however, is inapplicable as the filings in this case occurred prior to its June 18, 2015 effective date.

³29 C.F.R. §18.1 (2014) stated, in pertinent part, that the Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by the Part 18 Regulations, or by any statute, executive order or regulation. See 29 C.F.R. §18.10(a) (2015).

reconsideration before the administrative law judge for purposes of determining whether the tolling provision of Section 802.206(a) applies.⁵ *Galle*, 33 BRBS at 143-145. In reaching its holding, the Board reasoned that the regulatory reference in 29 C.F.R. §18.4 to time periods specified “under these rules or in an order issued hereunder” expressly limited the application of Section 18.4 to those time periods established or defined by 29 C.F.R. Part 18 or contained in an administrative law judge’s order issued pursuant to the OALJ Rules. *Galle*, 33 BRBS at 144 n.8. Thus, the Board stated that the OALJ regulation on computation of time, 29 C.F.R. §18.4 (2014), which included a provision that “when documents are filed by mail five (5) days shall be added to the prescribed period,” *see* 29 C.F.R. §18.4(c)(3) (2014),⁶ is not applicable. *Galle*, 33 BRBS at 144 n.8.

In affirming the Board’s decision, the Fifth Circuit, likewise held that the ten-day time period for the filing of motions for reconsideration of an administrative law judge’s decision, as set forth in 20 C.F.R. §802.206(b)(1), must be calculated using the computation method set forth in Rule 6(a) of the FRCP. *Galle*, 246 F.3d 440, 35 BRBS 17(CRT). The Fifth Circuit agreed with the Board’s analysis that Section 18.4 is not applicable in calculating the time period for the filing of a motion for reconsideration before the administrative law judge. In reaching this conclusion, the Fifth Circuit stated:

The regulation recognizing a right to seek reconsideration from the ALJ is

⁴Rule 6(a) of the FRCP as it existed in 1994 provided in part:

In computing any period of time prescribed or allowed by these rules . . . , or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Fed. R. Civ. P. 6(a). However, as a result of amendments to the FRCP in 2009, Rule 6(a) no longer excludes intermediate weekends and holidays. *See* n. 7, *infra*.

⁵The Board reasoned that its regulation at 20 C.F.R. §802.206 was based on FRCP 59(e). *Galle*, 33 BRBS at 144 (citing *Hines*, 1 BRBS at 5).

⁶Section 18.4(c)(3) was replaced by 29 C.F.R. §18.32(c) (2015) which added three, instead of five, days to the prescribed period for such filings.

placed exclusively in 20 C.F.R. Part 802, the set of regulations governing proceedings before the Board. Without some sound justification, it is difficult to ignore the computation provision located in Part 802 and jump to a functionally separate set of regulations for a time computation provision. This is particularly true when, as here, the separate set of regulations set forth in 29 C.F.R. Part 18 is facially limited to the rules defined in that part.

Galle, 246 F.3d at 450, 35 BRBS at 24(CRT). Thus, under *Galle*, “old” Rule 6(a) of the FRCP, which excluded “intermediate Saturdays, Sundays, and legal holidays,” applied to calculate the timeliness of a motion for reconsideration to the administrative law judge for purposes of determining the timeliness of a subsequent appeal of that decision.

Pursuant to the holding in *Galle*, applying “old” Rule 6(a) of the FRCP and excluding “intermediate Saturdays, Sundays and legal holidays,” in this case the weekends of May 16-17, and 23-24, and the Memorial Day holiday of May 25, 2015, counsel’s motion for reconsideration should have been filed no later than Friday, May 29, 2015. *Galle*, 246 F.3d 440, 35 BRBS 17(CRT). Applying “new” Rule 6(a) of the FRCP,⁷ the tenth day would have fallen on May 25, 2015, which was Memorial Day,

⁷Rule 6(a), as amended in 2009, states:

- (a) COMPUTING TIME. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.
 - (1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:
 - (A) exclude the day of the event that triggers the period;
 - (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
 - (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Fed. R. Civ. P. 6(a). The Advisory Committee Notes for the 2009 Amendment state that “subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed” as former Rule 6(a) “made computing deadlines unnecessarily complicated and led to counterintuitive results.” As an example, the committee noted that a 10-day period and a 14-day period that started on the same day usually ended on the same day-and the 10-day period not infrequently ended later than the 14-day period. “Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way.” Fed. R. Civ. P. 6 advisory committee’s note.

thereby extending the filing period for counsel's motion for reconsideration to Tuesday, May 26, 2015. Fed. R. Civ. P. 6(a)(1)(C). Thus, whether pursuant to the holding in *Galle* or by virtue of "new" Rule 6(a), counsel's motion for reconsideration dated June 1, 2015 and received by the OALJ on June 4, 2015 was untimely filed. Moreover, pursuant to *Galle*, application of either form of Rule 6(a) precludes, in contrast to counsel's general contention,⁸ the use of the "mailbox" rule articulated in the 29 C.F.R. §18.4 to extend the filing deadline beyond the aforementioned dates. *Galle*, 246 F.3d 440, 35 BRBS 17(CRT).

Counsel's untimely motion for reconsideration does not toll the period for filing an appeal of the administrative law judge's Attorney Fee Order. 20 C.F.R. §802.206(a). Any appeal of the administrative law judge's Attorney Fee Order, filed by the district director on May 14, 2015, was therefore due by Monday, June 15, 2015 (the 30th day was Sunday, June 14, 2015, *see* 20 C.F.R. §802.221(b)), making counsel's June 22, 2015 notice of appeal untimely. 33 U.S.C. §921(a); 20 C.F.R. §802.205(a), (c). We, therefore, dismiss counsel's appeal of the administrative law judge's Attorney Fee Order, BRB No. 15-0360, as it was untimely filed. *Id.*

Although counsel's appeal of the district director's Compensation Order, BRB No. 15-0496, was timely filed, we decline to review the district director's hourly rate award. The district director used the administrative law judge's hourly rate analysis for awarding counsel an hourly rate of \$300 and made no independent findings. As we are not reviewing the administrative law judge's findings, and as counsel does not independently raise any specific error in the district director's hourly rate determinations, we affirm the district director's fee order.⁹

⁸We further note that even if the new OALJ Rules, i.e., 29 C.F.R. §§18.93 and 18.32(c), applied, counsel's motion for reconsideration would be untimely.

⁹Counsel, in his petition for review in his appeal of the district director's attorney's fee award, BRB No. 15-0496, requests only that the Board take judicial notice of the briefs filed in his appeal of the administrative law judge's Attorney Fee Award, BRB No. 15-0360, because the district director "simply followed the OALJ's lead and appeared to incorporate or adopt the ALJ's findings and reasoning" with regard to his hourly rate determinations. *See* Cl. Pet. for Rev. at 1 (Feb. 23, 2016).

Accordingly, counsel's appeal of the administrative law judge's Attorney Fee Order and Order Denying Reconsideration, BRB No. 15-0360, is dismissed. The district director's Compensation Order Awarding Attorney Fees is affirmed. BRB No. 15-0496.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge